HIGH COURT OF AUSTRALIA

NOTICE OF FILING

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Details of Filing

File Number:	M21/2024
File Title:	Bogan & Anor v. The Estate of Peter John Smedley (Deceased
Registry:	Melbourne
Document filed:	Form 27F - R1 - R4 Outline of oral argument
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Important Information

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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

BETWEEN:

ANTHONY BOGAN
First Applicant
MICHAEL THOMAS WALTON
Second Applicant
and
THE ESTATE OF PETER JOHN SMEDLEY (DECEASED)
First Respondent
ANDREW GERARD ROBERTS
Second Respondent
PETER NANKERVIS
Third Respondent
JEREMY CHARLES ROY MAYCOCK
Fourth Respondent
KPMG (A FIRM) ABN 51 194 660 183
Fifth Respondent

OUTLINE OF ORAL SUBMISSIONS OF THE FIRST TO FOURTH RESPONDENTS

PART I CERTIFICATION

1. This outline of oral submissions is in a form suitable for publication on the internet.

Part II PROPOSITIONS TO BE ADVANCED IN ORAL ARGUMENT

Need for policy neutrality in transfer decisions

2. The meaning of "the interests of justice" in s 1337H of *Corporations Act 2001* (Cth) (**JBA 152**) cannot vary depending on the court in which a transfer application is being determined.

3. The factors to be considered in determining the more appropriate court in "the interests of justice" are not limited to the interests of the parties: *Schultz* [15] (**JBA 1078**). "Interests of justice" is wider than "justice in the proceeding" (cf. s 33ZDA *Supreme Court Act 1986* (Vic) (**JBA 237**)).

4. Interests of justice include matters of public interest, including public confidence in the integrity and impartiality of the courts. Such confidence is undermined by a court refusing to implement the legislative policy of a State: *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at [23] (Gleeson CJ).

5. It is equally undermined by a court of an integrated national judiciary applying a federal law regulating the exercise of federal jurisdiction making an evaluative judgment that the legislative policy of one State in the federation is better than another.

> *Schultz* [26] (Gleeson CJ, McHugh and Heydon JJ), [100] (Gummow J, Hayne J agreeing), [160], [162] [164], [171] (Kirby J) and [241], [258], [261] (Callinan J) (**JBA 1078-1150**); *Opes Prime* [25] (**JBA 3903**).

6. The Court of Appeal ([125] **CRB 48**) and the applicants (AS [22]) accept that s 1337H does not permit any assessment that one State's legislative policy is better than another, but, by giving weight to the existence of the GCO, do exactly that.

Competing legal policies

7. Contingency fees are against public policy in Australia: *Campbells Cash & Carry* [254] (**JBA 1490**); *Legal Profession Uniform Law*, s 183 (**JBA 556**). Lawyers may be restrained due to their conflict if paid a contingency fee (see DS [9], fn 13).

8. Reflects a policy assessment that any benefits in terms of access to the courts from contingency fees are outweighed by the risks to the administration of justice arising from the conflicts of interest involved and the perception of the lack of impartiality of lawyers so acting.

9. Victoria has legislated an exception by s 33ZDA.

10. Weighing the GCO as a relevant factor against transfer involves preferring the policy of Victoria over that in other States and Territories. It necessarily involves a value judgment about whether NSW or Victorian policy is more conducive to the "interests of justice".

11. Treating the GCO as relevant engenders competitive federalism, rather than the co-operative federalism envisaged by the Constitution and s 1337H. It has the effect of making Victoria a "magnet" to litigate class actions, regardless of their connection to the State and undermines the legislative policy of other States: *Schultz* [152], [241] **JBA 1118, 1145**). This has been the practical reality: Bell CJ speech, [34], [37]-[39].

12. The answer to the first reserved question should be "no", in which case the Court need not decide question two (and its attendant constitutional questions).

Dated: 12 November 2024

Tamieka Spencer Bruce **Daniel Farinha**